



Opening Statement: Montana Attorney General Tim Fox

Thank you for hosting us, and for giving us the opportunity to visit the Stanford campus and have a final word on this matter after all the evidence from trial has been gathered and evaluated.

Before I yield the floor to my colleagues, who will spend the majority of our time arguing on the specifics of the case, I would like to direct the Court's attention to some of the big picture issues for the State of Montana that rest in your hands.

As I mentioned at my trial opening in October, this case is important for Montana, and we believe this case is ripe for resolution, not only because of what has happened in the past, but particularly to protect Montana's rights in the future. Because of the nature of the Tongue River Basin and possibility of drought, Montana will continue to rely upon Wyoming's compliance with the Compact to protect our pre-1950 direct flow and storage water rights on a regular basis. The multi-million dollar question is, "How will Wyoming respond to Montana's shortage?"

To answer that question, we urge you to review what we have effectively proven at trial, and to understand the story of Montana's water users. Now that the facts are in, and you have heard from our witnesses and reviewed mountains of documents, we believe the story is clear:

For many years, since at least 1981, Wyoming has been on notice that Montana's pre-1950 water rights on the Tongue River were not being satisfied on a regular basis. This fact is clear, since the largest right on the river, the T&Y Canal, is also the second oldest right, and it calls the river fairly early in the irrigation season every year.

We have presented testimony by numerous Montana officials and water users, and we have presented many documents, demonstrating that Montana put Wyoming on notice of our water shortage.

Despite all this, Wyoming continues to dispute notice and there is a clear disagreement over the facts and the standards necessary for a call. The states need your, and ultimately the U.S. Supreme Court's, resolution of this and other issues.

Wyoming has never taken a single action to provide any water to Montana under the Compact. For many years, Wyoming insisted that there was no provision for a call, and the Yellowstone River Compact did not protect Montana's pre-1950 rights.

Now that Wyoming finally acquiesces in your ruling that it has a duty under the Compact to protect Montana's pre-1950 water rights, there is still no certainty that Wyoming will provide water to Montana.

You heard from Pat Tyrrell and Sue Lowry – the responsible Wyoming officials – that they will honor a call if they consider it valid. But you also heard, and Montana certainly heard, the likelihood for more delays or reasons why they would not honor a call.

In reviewing Mr. Tyrrell's testimony, we see there are many lingering disputes over whether Wyoming would honor a call from Montana, what it would require, and how long it would take. Mr. Tyrrell testified he would evaluate whether the call was futile, whether the water was actually going to be delivered to a particular headgate in Montana, how the water was going to be used, how much water might be lost between say Dayton, Wyoming, and the T&Y Canal near Miles City, Montana, and whether there was a genuine or legitimate need for the call.

That one example demonstrates that the two States need a resolution of this issue. Even though Mr. Tyrrell may be well-intentioned, these unanswered questions could delay or foreclose a call being honored while Montana users suffered. If Mr. Tyrrell's successor does not act in good faith, these unanswered questions will give Wyoming an avenue to delay or fail to honor a Montana call. Montana should not be held at the mercy of its upstream neighbor.

What this reveals is not only the need for resolution, as I told you in October in Billings. It also illustrates the materiality of this dispute. Montana and Wyoming have been unable to reach agreement on these issues despite having a Compact Commission since 1952, and since arguing over these issues since at least 1981. Both States have expended considerable sums of money and time to bring this dispute to a final resolution. Our presence here, as adverse parties with a clearly genuine dispute, is further evidence of the materiality of this controversy.

This Court is the only place we can get relief. You have before you a genuine dispute between two sovereigns, a dispute over both facts and law, which will affect their actions for all future time. It is important that the Court resolve the dispute and provide a workable methodology for Compact compliance.

For that reason, I urge you to resist Wyoming's requests to summarily dismiss this case, "without further ado," as they have stated so cavalierly.

So let me close by saying it isn't just about water rights, inter-state Compacts, and technical engineering and hydrology data. All of that is important, but it is important only because it leads us back to focus on the people who depend upon that water. They are the heart and soul of this case, and they are the reason we stand before you today.

You know Art Hayes. He still runs the original Brown Cattle Company, and is raising the next generation of stewards to take over for him. His leadership and dedication have kept the Tongue River Water Users Association thriving, running a large reservoir in a responsible manner, and supplying water to farms and ranches for a hundred and ninety miles. His future, and that of his sons, depends upon whether Wyoming will honor Montana's pre-Compact uses, which are the lifeblood of the Tongue River Valley in Montana.

You heard from John Hamilton, a soft-spoken and sincere gentleman who is a true innovator in agriculture. His years of research working on crop innovation have led him to grow alternative crops like melons and apples in a place in Montana that no one thought possible. He is also passing on his knowledge to the next generation, and they need to know whether Wyoming will protect their pre-Compact uses against post-Compact depletions upstream in Wyoming.

Les Hirsch is another smart businessman and innovative farmer, who suffered through the dry years by traveling hundreds of miles to cut and bale hay, hauled it home and took an economic loss on his cattle, but somehow he kept fighting on. He relies almost entirely on stored water out of the Tongue River Reservoir. His daughter is working alongside her father, and they need to know if the reservoir will receive its water from Wyoming.

And who can forget Jay Nance and Roger Muggli? They are the two bookends of the river, with the two oldest water rights on the Montana side. One is a tall, gentle and mild-mannered gentleman. The other is a short, intense and fully-energized gentleman. Their story is the story of the Tongue River, and their testimony is un-contested proof that Montana needs Wyoming to honor our senior water rights.

So I ask you to remember those Montana faces and stories. They have worked to overcome hardship and to keep their community together. They are not asking for special rules, they are just asking for both sides of the border to play by the same rules. The State of Montana looks to this Court to help us meet that request.

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